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FEDEX GROUND PACKAGE SYSTEM, INC.
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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA
10 OAKLAND DIVISION
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12 MICHELLE HINDS, an individual, and
TYRONE POWELL, an individual,

13 Plaintiffs,

14 vs.

15 FEDEX GROUND PACKAGE SYSTEM,
INC., a Delaware corporation; and BAY RIM
16 SERVICES, INC., a California corporation,

17 Defendants.
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Case No. 4:18-cv-01431-JSW (AGT)

**FEDEX GROUND'S REPLY IN SUPPORT
OF *MOTION IN LIMINE NO. 4* TO
EXCLUDE CERTAIN ARGUMENTS
ABOUT COMPLIANCE WITH
DEPARTMENT OF TRANSPORTATION
REGULATIONS**

Action Filed: March 5, 2018
FAC Filed: May 10, 2018
Trial: October 24, 2022

1 In their supplemental opposition, despite the Court’s request that they do so, Plaintiffs
2 do not dispute the myriad California cases holding that joint employment cannot be proven by
3 evidence that a company and a contracted service provider agreed to comply with specific
4 government regulations. *See, e.g., Moreau v. Air France*, 356 F.3d 942, 951 (9th Cir. 2004);
5 *Sw. Rsch. Inst. v. Unemployment Ins. Appeals Bd.*, 81 Cal. App. 4th 705, 709 (2000); *Morales-*
6 *Garcia v. Higuera Farms, Inc.*, No. 2:18-cv-05118-SVW-JPR, 2021 WL 6774327, at *17 (C.D.
7 Cal. Oct. 15, 2021); *Johnson v. Serenity Transp., Inc.*, No. 15-CV-02004-JSC, 2017 WL
8 1365112, at *8 (N.D. Cal. Apr. 14, 2017); *Bright v. Dennis Garberg & Assocs.*, No. CV 10-
9 07933 AHM (JCx), 2011 WL 13085923, at *5 (C.D. Cal. May 13, 2011); *Taylor v. Waddell &*
10 *Reed Inc.*, No. 09CV2909 DMS WVG, 2010 WL 3212136, at *3 (S.D. Cal. Aug. 12, 2010));
11 *Yessayan v. FedEx Ground Package Sys., Inc.*, No. CV 05-8872 ER (VBKx), 2007 WL
12 5162454, at *2 (C.D. Cal. Jan. 3, 2007); *Zhao v. Bebe Stores, Inc.*, 247 F. Supp. 2d 1154, 1161
13 (C.D. Cal. 2003); *see also, e.g., FedEx Home Delivery v. N.L.R.B.*, 563 F.3d 492, 497, 501
14 (D.C. Cir. 2009); *N.L.R.B. v. Assoc. Diamond Cabs, Inc.*, 702 F.2d 912, 922 (11th Cir. 1983);
15 *Local 777, Democratic Union Ord. Comm. v. N.L.R.B.*, 603 F.2d 862, 899 (D.C. Cir. 1978);
16 *Montoya v. 3PD, Inc.*, No. CV-13-8068-PCT-SMM, 2014 WL 3385116, at *3 (D. Ariz. July
17 10, 2014); *Matson v. 7455, Inc.*, No. CV-13-8068-PCT-SMM, 2000 WL 1132110, at *4
18 (D. Or. 2000).

19 Instead, Plaintiffs claim that the Independent Service Provider Agreement provisions on
20 which they intend to rely (Schedule I sections 1.1, 1.3, 1.4, 1.7, 2, 3, 5.3, 5.7) are outside the
21 scope of “the *Moreau* principle” because FedEx Ground imposed requirements that are stricter
22 than the DOT safety regulations.¹ (Pls.’ Supp. Opp’n 2-4, ECF No. 245.) This misses the mark.
23 FedEx Ground never argued that Plaintiffs cannot elicit evidence or argue about provisions that
24 exceed the DOT’s safety regulations. They can, and FedEx Ground will present its own

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26 ¹ Plaintiffs are wrong in claiming (at 3) that no DOT regulation prohibits the transport of
27 unauthorized persons, as found in Schedule I, section 2 of the Agreement. *See* 49 C.F.R.
28 § 392.60(a) (“Unless specifically authorized in writing to do so by the motor carrier under
whose authority the commercial motor vehicle is being operated, no driver shall transport any
person or permit any person to be transported on any commercial motor vehicle other than a
bus.”).

1 testimony and evidence in response.

2 What Plaintiffs cannot do is equate actual rules mandated by the DOT—such as its
3 requirements that drivers fill out an application and submit to a background check, physical
4 examination, and drug test before they can drive (and then random drug tests after that); that
5 motor carriers and drivers complete regular maintenance paperwork and maintain records for
6 hours-of-service compliance; and that disqualified drivers be barred from driving during their
7 disqualification period—to “control by FedEx Ground.” (*See* Appendix A.) But this is precisely
8 what they have done in prior briefing and argument before the Court, and why FedEx Ground
9 has asked for an advance ruling on this issue:

- 10 • “In order to become a Delivery Driver, FedEx requires completion of a background
11 check paid for by FedEx, a physical/medical exam that FedEx will pay for if an ISP
12 uses an approved medical examiner’, a drug test that FedEx will pay for if a ‘FedEx
13 Ground-qualified collection site is utilized’, and a road test.” (Pls.’ Class Cert. Mem. 11
14 (citing Agreement, Schedule I ¶¶ 1.2, 3, Schedule of Amendments ¶ 1.1) (emphasis
15 added); *see also id.* at 23; Hinds Decl. in Support of Pls.’ Mot. for Class Cert. ¶ 8, ECF
16 No. 113-22.)
- 17 • “I was required to fill out an application at the FedEx Ground facility to deliver FedEx
18 packages.” (Hinds Decl. in Support of Pls.’ Mot. for Class Cert. ¶¶ 6-7, ECF No. 113-
19 22; Powell Decl. in Support of Pls.’ Mot. for Class Cert. ¶ 6, ECF No. 113-24.)
- 20 • “FedEx requires Delivery Drivers to prepare ‘daily driver logs, daily vehicle inspection
21 reports and any other legally required documents’ and file them with FedEx ‘at the end
22 of each Service Day.’” (Pls.’ Class Cert Mem. 9 (citing Agreement, Attachment A-2 to
23 Schedule A, ¶ 2.7) (emphasis added).)
- 24 • “FedEx further requires ISPs to submit a monthly maintenance record to FedEx
25 showing that they are in compliance with federal motor carrier safety regulations.”
26 (Pls.’ Class Cert Mem. 10 (citing Agreement ¶ 8.4(A)) (emphasis added).)
- 27 • “Each vehicle must also be marked with an FXG-provided unit number.” (Pls.’ Class
28 Cert Mem. 9 (citing Agreement § 8.3(A).)

1 • “FedEx also requires Delivery Drivers to use the scanners at the beginning and end of
2 every workday to report their on-duty hours using their unique employee ID number
3 and password. The software in the scanners records and analyzes data and produces
4 detailed reports for FedEx, including reports that flag shifts for DOT hours-of-service
5 violations.” (Pls.’ Class Cert. Mem. 8-9 (emphasis added).)

6 • “The ISPA also provides a list of twenty-three (23) instances in which Delivery Drivers
7 become ‘disqualified’ and may no longer work under the ISPA, either permanently or
8 for a specified period of time. If a disqualifying event occurs, an ISP must disqualify the
9 Delivery Driver” (Pls.’ Class Cert. Mem. 12 (citing Agreement, Schedule I, ¶ 1.4).)

10 Because these provisions are directly aimed at ensuring DOT compliance, as shown in
11 Appendix A, Plaintiffs cannot argue they constitute relevant evidence of control for purposes of
12 proving joint employment. Similarly, while Plaintiffs are correct that the contract sets forth
13 some qualification and disqualification standards that exceed DOT requirements (and they can
14 make that point), Plaintiffs should be precluded from arguing the mere fact that FedEx Ground
15 and Service Providers agree that disqualified drivers cannot drive is proof of control. Indeed,
16 allowing Plaintiffs to do so because FedEx Ground has imposed greater safety standards
17 “would be counterproductive and would create a disincentive” for motor carriers to ensure safe
18 conditions. *See Zhao*, 247 F. Supp. 2d at 1161; *Morales-Garcia*, 2021 WL 6774327, at *17.

19 CONCLUSION

20 For these reasons and those set forth in *Motion in Limine No. 4*, FedEx Ground
21 respectfully requests that the Court preclude Plaintiffs from offering evidence of DOT
22 compliance solely to prove joint employment, from arguing that compliance with DOT
23 regulations is evidence of joint employment, and from attributing DOT regulations to “FedEx
24 Ground requirements or control.”

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1 Dated: September 30, 2022

Respectfully submitted,

2 WHEELER TRIGG O'DONNELL LLP

3 By: /s/ Jessica G. Scott

4 JESSICA G. SCOTT

5 Attorney for Defendant

FEDEX GROUND PACKAGE SYSTEM, INC.